



BellSouth Telecommunications, Inc.

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August 9, 2004

Public Service Commission of South Carolina
Attention: Docketing Department
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: TC Systems, Inc. (Complainant/Petitioner) vs. BellSouth
Telecommunications, Inc. (Defendant/Respondent)
Docket No. 2004-118-C

Dear Sir:

On August 9, 2004, BellSouth filed its Opposition to TC Systems, Inc.'s Motion for Summary Judgment, its Cross-Motion for Summary Judgment in Favor of BellSouth, and its Request for Oral Argument. Attachment A to BellSouth's response was a copy of the Affidavit of Nicole W. Bracy. Enclosed for filing is the original Affidavit of Nicole W. Bracy.

By copy of this letter I am advising all parties of same.

Sincerely,

Patrick W. Turner

w/permission by GFB

PWT/nml

cc: F. David Butler, Esquire
Florence Belser, Esquire
John J. Pringle, Jr., Esquire
Gene V. Coker, Esquire

Enclosures
PC Docs #546745

AFFIDAVIT OF NICOLE W. BRACY

STATE OF Georgia)
COUNTY OF Fulton)

FILED
2001 APR 10 AM 11:26
CLERK OF SUPERIOR COURT
FULTON COUNTY, GEORGIA

1. My name is Nicole W. Bracy and I am employed by BellSouth Telecommunications, Inc. ("BellSouth") as a Pricing Specialist in the Interconnection - Marketing group. I am over 18 years old and have personal knowledge of the facts set forth in this affidavit.

2. I am submitting this affidavit in opposition to the Motion for Summary Judgment filed by TC Systems, Inc. ("TCS") and in support of the Cross-Motion for Summary Judgment filed by BellSouth.

3. In 2001, BellSouth and AT&T Communications of the Southern States ("AT&T") submitted their interconnection agreement ("the AT&T Agreement") to the Public Service Commission of South Carolina ("Commission") for its approval pursuant to Section 252(e) of the 1996 Act. Attachment 1 to this affidavit is a true and accurate copy of the letter submitting the AT&T Agreement to the Public Service Commission of South Carolina ("Commission") for its approval.

4. The Commission approved the AT&T Agreement during its Regular Business Session on February 20, 2002. Attachment 2 to this affidavit is a true and accurate copy of the letter from the Commission memorializing this approval.

5. The AT&T Agreement expires in December 2004.

6. I have reviewed the affidavit of Billy C. Peacock submitted in support of TCS's Motion for Summary Judgment in Docket No. 2004-118-C. I agree that Mr. Peacock and I exchanged certain correspondence regarding the issues involved in this proceeding, and that accurate copies of those letters are attached to Mr. Peacock's affidavit. I am also aware that Lisa Foshee, Senior Corporate Counsel-Regulatory for BellSouth, and James J.R. Talbot, Senior Attorney for AT&T, also exchanged correspondence regarding this issue in May of 2004. Attachment 3 to this affidavit contains a true and accurate copy of Mr. Talbot's April 26, 2004 letter (without attachments), Mrs. Foshee's May 4, 2004 letter, Mr. Talbot's May 17, 2004 letter, and Mrs. Foshee's May 26, 2004 letter.

7. I do not dispute the factual assertions in paragraphs 1 and 2 of Mr. Peacock's affidavit concerning his identity and TCS's corporate status. I agree with the statement in paragraph 3 of his affidavit that TCS and BellSouth have never entered into an interconnection agreement in South Carolina. TCS filed its Application for authority to provide certain telecommunications services with the Commission on March 10, 2004, and the Commission entered its Order addressing that application on July 2, 2004. Attachment 4 to this affidavit contains true and accurate copies of TCS's application (without attachments) and the Commission's Order. TCS, therefore, is a new CLEC in South Carolina and did not hold a certificate of authority to operate in South Carolina prior to July 2004.

8. TCS requested to "opt in" to the AT&T/BellSouth interconnection agreement on February 25, 2004. Attachment 5 to this affidavit is a true and accurate copy of the letter by which TCS made this request.

9. I agree with the statements in paragraph 4 of Mr. Peacock's affidavit, except that I disagree with Mr. Peacock's characterization of BellSouth's position. I agree that BellSouth

refused to sign the Adoption Agreement submitted by TCS and attached to Mr. Peacock's affidavit as Exhibit 1 (Peacock Affidavit, ¶ 5), and with the statements in paragraph 6. I agree with the first sentence of paragraph 7. I do not dispute the statements in paragraphs 8, although as explained below, I clarified BellSouth's position several times in subsequent letters. I also do not dispute the statements in paragraphs 9 and 11.

10. I dispute Mr. Peacock's statement in paragraph 3 concerning BellSouth's position on allowing TC Systems's affiliated corporation, AT&T, to amend its existing interconnection agreement with BellSouth to add TC Systems as a co-party to that agreement. Specifically, I disagree with the statement that, "[b]ecause TCS and AT&T are separate entities, TCS must obtain a separate interconnection agreement ('ICA') with BellSouth". I further disagree with the statement that "[a]lthough BellSouth recognizes that TCS is an affiliate of AT&T, BellSouth has been unwilling to allow TCS to use the AT&T ICA using a separate operating code number." BellSouth has advised TC Systems on several occasions, most recently at a meeting held on July 26, 2004, that TC Systems and AT&T may amend the AT&T interconnection agreement to add TC Systems as a co-party, and that TC Systems can maintain its own separate operating code numbers under that amended agreement for purposes of ordering, provisioning, and tracking costs.

11. I also take issue with the repeated allegations that BellSouth has denied or refused TCS's request to opt into the AT&T agreement (Peacock Affidavit, ¶¶4, 10, 12-13). BellSouth's position is that TCS may adopt the AT&T Agreement, subject only to the requirement that it conform certain, specific provisions of that agreement to existing law. (*See* Attachment 3 to this affidavit, Mrs. Foshee's May 4, 2004 letter). The AT&T agreement contains certain terms and conditions that do not reflect the rights and obligations of the parties under current law.

BellSouth is not willing to agree to include in TC System's new interconnection agreement outdated terms and conditions that are inconsistent with current law.

12. Specifically, Attachment 2 of the AT&T agreement sets forth the rates, terms and conditions of access to unbundled network elements. It contains provisions based on the FCC's second set of UNE rules,¹ that were vacated by the D.C. Circuit of Appeals in 2002² and replaced by different rules in the FCC's Triennial Review Order issued on August 21, 2003.³ Some of these newer rules remain valid and enforceable today. For example, the Triennial Review Order modified the definition of the unbundled network element known as "dedicated transport" to include only those facilities creating a transmission path between ILEC switches and wire centers, thus eliminating the ILEC's obligation to unbundle entrance facilities (i.e., facilities between an ILEC switch or wire center and a CLEC switch or wire center). Further, the FCC modified the ILEC obligation to provide unbundled access to fiber loops under certain conditions. These provisions of the *Triennial Review Order* were not vacated on appeal, and they reflect the state of the law as it exists today. AT&T recognizes that these provisions of its Attachment have been affected by changes in the law. Pursuant to the change-of-law notice issued by BellSouth in the fall of 2003, BellSouth and AT&T are negotiating changes to those provisions.

13. Attachment 2 of the AT&T agreement also contains provisions that do not comply with existing law because they are based on rules in the Triennial Review Order that were

¹ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order, 15 FCC Rec 3696, 3725 (1999).

² *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

³ Report and Order and Order on Remand, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338 *et al.*, FCC 03-36, 18 FCC Rcd 16978 (Aug. 21, 2003) ("Triennial Review Order").

vacated by a second D. C. Circuit Court of Appeals decision on March 3, 2004.⁴ For example, the FCC's rule regarding access to unbundled switching to "mass market" customers was vacated, effective March 16, 2004. Although the FCC did not appeal the D.C. Circuit's decision, a number of competitive local exchange carriers have sought a writ of certiorari with the United States Supreme Court. However, as with any change of law, and consistent with the Parties' interconnection agreement, both Parties are obligated, upon request, to modify the agreement due to changes in law. BellSouth has notified AT&T of its intent to modify the agreement and is currently in negotiations with AT&T, both in the context of subsequent agreements where interconnection agreements are expiring, and of amendments to agreements that are not due to expire.

14. Attachment 3 of the AT&T agreement deals with the rates, terms and conditions of the interconnection of the AT&T and BellSouth networks. Certain provisions of Attachment 3 deal with reciprocal compensation for termination of Internet Service Provider ("ISP")-bound traffic. Those provisions reflect the terms of the FCC's ISP Order,⁵ under which the FCC allowed carriers that were exchanging traffic during the first quarter of 2001 to continue receiving compensation for ISP-bound traffic, albeit at transitional, capped rates. TCS was not operating in South Carolina in 2001, and was not exchanging any traffic with BellSouth in South Carolina at that time. Carriers, such as TCS, that were not exchanging traffic as of that date receive no compensation for ISP traffic under the Order. TCS has acknowledged that it is not

⁴ *United States Telecom. Ass'n v. Federal Communications Comm'n*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

⁵ Order on Remand and Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 & 99-68, 16 FCC Rcd 9151 (April 18, 2001) (the "ISP Order").

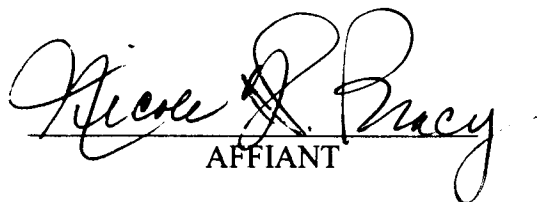
entitled to receive the reciprocal compensation for ISP traffic that AT&T receives under the AT&T agreement. (See Attachment 3 to this affidavit, Mr. Talbot's May 17, 2004 letter).

15. As the negotiator responsible for working with TCS, it is my job to help it get into business as soon as possible. I offered TCS a number of options to achieve this end. First, I offered to allow TCS to adopt the AT&T agreement, with and updated Attachment 2 that BellSouth believes conform to existing law. In this connection, I offered to agree to allow TCS to commence renegotiation immediately upon execution of the agreement of any term or condition in the updated Attachment 2. Second, I offered to amend the AT&T agreement to allow TCS to become a party to that agreement, subject to TCS and AT&T agreeing to be jointly and severally liable with AT&T under that agreement. BellSouth has specifically agreed that TCS can maintain separate operating codes under the amended AT&T agreement. Third, TCS can execute BellSouth's standard interconnection agreement in order to get into business immediately, and commence renegotiation of any term or provision it desires to change immediately thereafter. Fourth, BellSouth has signed South Carolina interconnection agreements with other carriers that are compliant with the *Triennial Review Order* and with *USTA II*, and BellSouth is willing to enter into an identical South Carolina interconnection agreement with TCS.

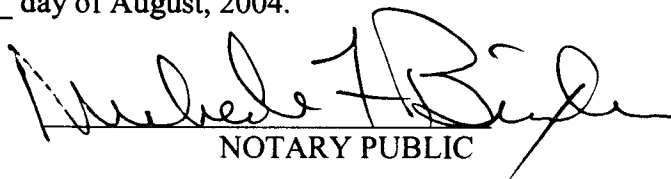
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16. Attachment 6 to this affidavit is a true and accurate copy of Attachment 2 of the AT&T agreement, including amendments thereto, that have been filed with the Commission to date.

This concludes my affidavit.


AFFIANT

Sworn to and subscribed before me this 9th day of August, 2004.


NOTARY PUBLIC

My Commission Expires: _____
MICHEALE F. BIXLER
Notary Public, Douglas County, Georgia
My Commission Expires November 3, 2005

[SEAL]